EXHIBIT D

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CHRISTALEE ABREU, individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

v.

SLIDE, INC. and GOOGLE INC.,

Defendants.

Case No. CV12-00412-WHA

[Removed from Santa Clara County Superior Court Action No. 1:11-CV-215376]

NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION OR, IN THE ALTERNATIVE, TO DISMISS UNDER RULE 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: Thursday, May 31, 2012
Time: 2:00 p.m.
Dept.: Courtroom 8, 19th Floor
Judge: Hon. William H. Alsup

Date Comp. Filed: December 20, 2011

Trial Date: None Set

NOTICE OF MOTION AND STATEMENT OF RELIEF SOUGHT

PLEASE TAKE NOTICE that on May 31, 2012, before the Honorable William H. Alsup, of the United States District Court, 450 Golden Gate Avenue, Courtroom 8, 19th Floor, San Francisco, California 94102, defendants Slide, Inc. ("Slide") and Google Inc. ("Google") will, and hereby do, move the Court for an order compelling arbitration pursuant to the terms of the Terms of Use governing SuperPoke! Pets or, in the alternative, an order dismissing this action in its entirety. The grounds for this motion are that (1) Plaintiff's claims are subject to arbitration under the valid and enforceable Terms of Use governing her use of SuperPoke! Pets, the game that is the subject of her claims, and (2) even as alleged in her Complaint, Plaintiff's claims about the SuperPoke! Pets Terms of Use and events surrounding the game's closure are self-contradictory and implausible, and do not state any cognizable legal claim on which relief can be granted. This Motion is based on this Notice; on the attached Memorandum of Points and Authorities; on the concurrently filed Declarations and Request for Judicial Notice, and all other pleadings, files and records in this action; and on such other argument as may be received by this Court at the hearing on this Motion.

Dated: April 24, 2012

KEKER & VAN NEST LLP

By: *Steven K. Taylor*
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SLIDE, INC. and GOOGLE INC.

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I. INTRODUCTION

Plaintiff's complaint should be arbitrated or dismissed, because of the provisions of the Terms of Use ("TOU") to which Plaintiff agreed as a condition of playing SuperPoke! Pets. SuperPoke! Pets was an on-line game that gave users the opportunity to accessorize electronic images of pets and create "habitats" for them. Users could play for free, or to enhance their gaming experience, purchase virtual currency that could be used to access special in-game accessories. The gravamen of Plaintiff Christalee Abreu's complaint is that she suffered harm from the announcement by Slide and Google (collectively, "Defendants") that they were discontinuing the SuperPoke! Pets game, although she had over six months' notice of the closure. But Plaintiff cannot avoid the TOU, which both (1) permit Defendants (or Plaintiff) to remove this dispute from the court and into arbitration, and (2) permit Defendants to do exactly what they have done here.

First, all of Plaintiff's claims must be arbitrated, as required by the arbitration provision in the game's TOU. Agreeing to the arbitration provision was a condition of playing the game, and the arbitration provision is valid and enforceable under controlling Supreme Court precedent and federal law. The Federal Arbitration Act requires strict enforcement of arbitration provisions like the one at issue here, with very limited exceptions that do not apply in this case. Contrary to Plaintiff's misleading characterizations (and selective quotations) in her Complaint, the actual arbitration provision in the SuperPoke! Pets TOU provides a fair mechanism for Plaintiff to obtain quick and inexpensive resolution of her claims, which should be enforced.

Second, if the Court does not compel arbitration, it should dismiss the Complaint because Plaintiff has not, and cannot, sufficiently plead any legally sufficient claims. Specifically, the Complaint fails because it does not identify a cognizable legal basis for Plaintiff's claims that the shut-down of SuperPoke! Pets was unlawful. Plaintiff's Complaint contradicts both the TOU and common sense by claiming that she should be compensated because she received no lasting "investment" from playing an online game designed purely for entertainment. In particular, Plaintiff claims injury because she can no longer continue playing with her online pets after

Defendants discontinued the game on March 6, 2012. Further, she accuses Defendants of fraud and unfairness because they did not tell her when they made changes to the game in June 2011 that the game would be shut down completely in March 2012. Neither argument has any basis. The specific terms that Plaintiff challenges are *not* ones that she has plead actually caused her any harm, and those terms are not unfair or improper under the facts or law, especially in the context of an online recreational game. In fact, because the TOU made clear that the SuperPoke! Pets game created no property rights in users and could be ended at any time by Defendants, each and every one of Plaintiff's claims must be dismissed. By Plaintiff's own allegations, Defendants have done nothing improper, unfair, or fraudulent. Instead, Defendants acted in accordance with the TOU, and Plaintiff has not alleged, and cannot prove, otherwise. That Plaintiff wants to keep playing a game that has been discontinued may be disappointing, it does not create a legally cognizable action. If the Court does not compel arbitration, Plaintiff's Complaint should be dismissed in its entirety.

II. BACKGROUND

Although the Court must accept well-pleaded factual allegations as true when evaluating a motion to dismiss, it need not credit many of Plaintiff's conclusory, non-factual allegations. Stripped to its legitimately factual allegations and in light of the full text of the documents selectively incorporated therein (as attached to the Declaration of Libor Michalek[1]), the

[1] The Michalek Declaration provides the full text of documents relied upon in the Complaint, as well as additional facts related to Defendants' motion to compel arbitration. In evaluating the motion to compel arbitration under 9 U.S.C. § 4, the Court can rely on all of the facts and documents included in the Michalek Declaration. *See Khan v. Orkin Exterminating Co., Inc.*, No. C 10-02156 SBA, 2011 WL 4853365, *4 (N.D. Cal. Oct. 13, 2011) (considering similar facts on motion to compel arbitration).

In evaluating Defendants' motion in the alternative to dismiss Plaintiff's claims under Rule 12(b)(6), the Court can still consider the full text of the TOU and SuperPoke! Pets announcements, even though Plaintiff failed to attach them to her pleading, because Plaintiff's Complaint expressly relies on and purports to quote from these documents. *See Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 983 (N.D. Cal. 2010) (explaining that on a motion to dismiss "(1) a court may take judicial notice of material which is either submitted as part of the complaint or necessarily relied upon by the complaint; and (2) a court may take judicial notice of matters of public record"); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)).

Complaint states no facts sufficient to support Plaintiff's claims.

A. SuperPoke! Pets was an Online Video Game.

SuperPoke! Pets was an online video game launched by Slide in approximately April 2008, which was made available both through social media platforms including Facebook and Myspace, and on its own website (www.spp.com). Complaint ¶ 9. In the game, players could "adopt" virtual pet animals, which they could then "interact with" virtually, including by "customiz[ing] the pet's virtual environment" and by "dress[ing] it in outfits." Complaint ¶ 12. As part of the game, a SuperPoke! Pets player could use various virtual items to decorate his or her pet and its "virtual habitat." Complaint ¶ 15. According to Plaintiff, these items included "virtual hotdogs" and "virtual stuffed animals." Complaint ¶ 18.

According to the Complaint, some of the items featured in the game were available to players who "perform[ed] various tasks" or attained other "achievements" in the game. Other features, including "'exclusive' premium content" available for "VIP status" subscribers, were available only to players who choose to spend actual money to play with them. Complaint ¶ 16, 20. The Complaint alleges that VIP status was first made available in late 2010, for a fee of $4.95 per month. Complaint ¶ 20.

The right to play Superpoke! Pets was subject to Slide's Terms of Use ("TOU"). Complaint ¶ 28. Plaintiff was an active user of Superpoke! Pets beginning in 2009. *See* Complaint ¶ 49. Plaintiff asserts that the TOU are a contract between herself and Defendants. Complaint ¶ 63; *see also* Complaint ¶ 89.

B. The Terms of Use governing Plaintiff's play of SuperPoke! Pets permit either party to invoke arbitration for disputes.

The TOU contain an arbitration provision. Complaint ¶ 74. That provision is as follows:

> 4. **Binding Arbitration**. If you and the Company are unable to resolve a Dispute through informal negotiations, either you or the Company may elect to have the Dispute (except those Disputes expressly excluded below) finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party shall be final and binding on the other. YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL. The arbitration shall be commenced and conducted under the Commercial Arbitration Rules of the American Arbitration Association

> ("AAA") and, where appropriate, the AAA's Supplementary Procedures for Consumer Related Disputes ("AAA Consumer Rules"), both of which are available at the AAA website www.adr.org. The determination of whether a Dispute is subject to arbitration shall be governed by the Federal Arbitration Act and determined by a court rather than an arbitrator. Your arbitration fees and your share of arbitrator compensation shall be governed by the AAA Rules and, where appropriate, limited by the AAA Consumer Rules. If such costs are determined by the arbitrator to be excessive, the Company will pay all arbitration fees and expenses. The arbitration may be conducted in person, through the submission of documents, by phone or online. The arbitrator will make a decision in writing, but need not provide a statement of reasons unless requested by a party. The arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Except as otherwise provided in this Agreement, you and the Company may litigate in court to compel arbitration, stay proceedings pending arbitration, or to confirm, modify, vacate or enter judgment on the award entered by the arbitrator.

Michalek Decl. Exh. 1 (TOU) at ¶ XIV.A.4. In addition, the TOU prohibit class arbitrations, and require that "any arbitration shall be limited to the Dispute between the Company and you individually." *Id.* ¶ XIV.A.5. The TOU also exempt certain claims from arbitration, namely "(1) any Disputes [regarding] any of your or the Company's intellectual property rights; (2) any Dispute related to, or arising from, allegations of theft, piracy, invasion of privacy or unauthorized use; and (3) any claim for injunctive relief." *Id.* ¶ XIV.A.6.

C. The Terms of Use advised Plaintiff of her limited rights in the game and Defendants' right to discontinue the game entirely.

The TOU explained to players that Defendants reserved the right to discontinue the game at any time, that SuperPoke! Pets users had no ownership rights in any aspect of the game even if they paid money for an enhanced playing experience, and that any payments made to play were non-refundable. Specifically, the TOU provide as follows:

- "The Company reserves the right to discontinue the [game] or to change the content of the [game] in any way and at any time, with or without notice to you, without liability." TOU § II.B (under the heading "What the Company is Providing").
- Users of SuperPoke! Pets are "grant[ed] . . . a non-exclusive, non-transferable, revocable limited license to use the [game] and related software and to display the results of [the game] for your personal non-commercial use." TOU § II.A.
- Users "do not acquire any ownership rights by using the [game] . . . or by purchasing any virtual goods or virtual currency (see Section VI, below)." TOU § IV.B.

- Although the game "include[s] a component of fictional currency" known as Gold ("Virtual Currency"), that "Gold" is purely an element of the game and has no real-world value: "[r]egardless of terminology used, Virtual Currency represents a limited license right governed solely under these Terms, and is not redeemable for any sum of money or monetary value from the Company at any time." TOU § VI.A.

- Under the heading "All Sales Final," users "agree that all sales of Virtual Goods and Virtual Currency by the Company are final" and that "[n]o refunds will be given, except in the Company's sole and absolute discretion. All Virtual Goods and Virtual Currency will be forfeited if your account is terminated . . . for any reason . . . or if the Company discontinues providing the Service." TOU § VI.F.

The TOU also provide that users "agree that the Company has the absolute right to manage, regulate, control, modify, and/or eliminate such Virtual Currency as it sees fit in its sole discretion, in any general or specific case, and that the Company will have no liability to you based on its exercise of such right." TOU § VI.A. *See also* TOU § VI.E.2 (repeating essentially the same limitation under the heading "Limited Rights," and addressing both Virtual Goods and Virtual Currency); TOU § VI.E.1 (explaining that users "have no right or title in or to any such Virtual Goods or Virtual Currency" or other aspects of the game "[o]ther than a limited, personal, revocable, non-transferable, non-sublicenseable license to use the Virtual Goods or Virtual Currency in the Service").

D. Slide and Google gave Plaintiff notice of the game's modification and eventual discontinuation.

According to Plaintiff, in early June of 2011, Defendants "announced several changes to SPP through the game's official online forums." Complaint ¶ 33. Specifically, "Defendants announced that SPP users could no longer purchase gold using cash, and that Defendants would no longer be releasing new 'gold items' for purchase." Complaint ¶ 33. Users could continue using the gold they had already purchased. "Defendants additionally instructed SPP users to spend any outstanding gold on existing virtual items on or before June 30, 2011." Complaint ¶ 34. As alleged by Plaintiff, Defendants did not encourage users to buy more gold, but stated definitively that "[a]fter that date [June 30, 2011] . . . no gold items would be available, and the value of any gold remaining in users' accounts would disappear and would not be refunded." Complaint ¶ 34.

Plaintiff alleges that around the same time, Slide and Google assured users that the game would not be shut down "in July 2011" or "in the near future." Complaint ¶ 37. In late August and September 2011, Defendants announced that the game would be shut down six months later, on March 6, 2012—roughly 8 months after the June 2011 announcements. Complaint ¶¶ 44 & 45. Although Plaintiff alleges that Defendants "promised" in June 2011 that they "had no plans to shut the site down," Complaint ¶37, Plaintiff does not allege that those alleged promises were false or deceptive at the time that they were made.

Plaintiff also alleges that in the June 2011 announcements Defendants "promised those who signed up for the [VIP status] program before June 30, 2011 that they would enjoy continued access to the VIP Status 'for life.'" Complaint ¶ 38. In fact, however, the allegation that users were promised any status "for life" is directly contrary to the actual text of the announcements made in June 2011 (which Plaintiff purports to quote in her Complaint), which indicated that VIP status would continue for "as long as the program exists," which at that time was anticipated to be for the "foreseeable future." Michalek Decl. Exhs. 4 & 5 (June 2011 announcements). Plaintiff does not, and cannot, allege that Defendants failed to provide VIP access to those customers or asked them to pay for VIP service after June 2011.

According to Plaintiff, Slide and Google then notified users in August and September 2011 of their business decision to shut down SuperPoke! Pets, granting users more than six months after that decision was made to continue playing the game (which remained in service until March 6, 2012). Complaint ¶¶ 44-45. Although nothing in the TOU required them to do so, Defendants also (according to Plaintiff's own allegations) provided two different options for users to preserve a version of their fictional pets and other fictional items from the game after its closure. Complaint ¶ 46.

E. Procedural History.

Plaintiff filed this action in the Santa Clara County Superior Court on December 20, 2011, asserting claims for declaratory relief related to the SuperPoke! Pets TOU, statutory claims under California's Consumer Legal Remedies Act (CLRA) and Unfair Competition Law, and

causes of action for fraud in the inducement, injunctive relief, and unjust enrichment. Plaintiff purports to bring all of these claims on behalf of two classes, consisting of all registered SuperPoke! Pets users who purchased virtual gold or purchased virtual in-game items from SPP-certified resellers, and all individuals who purchased one or more months of SuperPoke! Pets VIP status. Complaint ¶ 54. Defendants removed the action to this Court on January 26, 2012, and the Court denied Plaintiff's motion to remand on April 3, 2012.

III. ARGUMENT

Plaintiff's claims have no place in this Court. First, Plaintiff's claims must be arbitrated. The arbitration provision in the TOU requires arbitration of the claims asserted in Plaintiff's Complaint. This provision is valid and enforceable, and under controlling law requires arbitration of Plaintiff's claims. Second, Plaintiff's action should be dismissed for failure to state any legally cognizable or factually plausible claim. The TOU Plaintiff agreed to legitimately authorized Defendants' termination of the game, Plaintiff has failed to allege any wrongful conduct by Defendants, and Plaintiff received the benefit of her agreement to the TOU by playing the online SuperPoke! Pets game for more than two years.

A. The Court Should Compel Arbitration

The SuperPoke! Pets TOU require arbitration of this dispute upon election by either party. The TOU contain an arbitration clause, which provides that "either you [the user] or the Company may elect to have [any] Dispute (except those Disputes expressly excluded below) finally and exclusively resolved by binding arbitration." Michalek Decl. Exh. 1 (TOU) at ¶ XIV.A.4. This binding arbitration "shall be commenced and conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and, where appropriate, the AAA's Supplementary Procedures for Consumer Related Disputes ("AAA Consumer Rules")." *Id.* The arbitration provision warns users that "YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL." *Id.* ¶ XIV.A.4. Through this Motion, Defendants hereby elect to arbitrate this dispute in accordance with the TOU's arbitration clause, and that election should be enforced.

This arbitration provision is fair and enforceable under the Federal Arbitration Act. The Federal Arbitration Act and the Supreme Court's mandates strongly favor arbitration. Agreements to arbitrate are fully enforceable under the Federal Arbitration Act, unless a party to the agreement proves that he or she would be entitled to revocation of the agreement under generally applicable state-law principles. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011). The law embodies a strong, liberal national policy favoring arbitration. *Id.* at 1749 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). State rules that interfere with and restrict arbitration, even under the guise of purportedly general-purpose doctrines such as unconscionability, are preempted and void under the FAA. *Concepcion*, 131 S.Ct. at 1746-47. In evaluating a motion to compel arbitration, the court considers only the arbitration provision at issue—not the validity of any other provisions of the contract. *Buckeye Check Cashing*, 546 U.S. at 449 ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.")

Thus, in order to avoid arbitration for her dispute, Plaintiff must prove that the arbitration provision is both procedurally and substantively unconscionable under California law, within the preemptive constraints of the Federal Arbitration Act. *See Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000) (California standard); Cal. Civ. Code § 1670.5 (allowing courts not to enforce unconscionable contract provisions). Procedural and substantive unconscionability are judged on a sliding scale: the more substantively unconscionable a contract term is, the less procedural unconscionability is required to find the term unenforceable. *Armendariz*, 24 Cal. 4th at 114. Plaintiff cannot satisfy *either* standard.

1. The arbitration clause is not substantively unconscionable.

To be found substantively unconscionable, a contract provision must be not just unreasonable or unfair, but "so one-sided as to 'shock the conscience.'" *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1322 (2005) (citation omitted). The arbitration provision here is fair, contrary to the incomplete and conclusory allegations of Plaintiff's

Complaint, and does not "shock the conscience."

First, the arbitration procedure is fair. The arbitration clause provides an expedient, low-cost mechanism for resolving Plaintiff's dispute: "[a]rbitration may be conducted in person, through the submission of documents, by phone, or online." TOU XIV.A.4. Indeed, for Plaintiff, arbitration under these terms provides a much cheaper, faster mechanism for resolving her claim than the instant lawsuit likely would. Nor is the arbitration clause one-sided: it permits either party to challenge an arbitration award if the arbitrator fails to follow applicable law, to move to compel arbitration or stay proceedings, or to vacate an award. *Id.* While Plaintiff claims that the TOU are "one-sided" because they do not provide for her to recover costs or attorneys' fees if she prevails, the agreement does not provide for *either* party to recover fees (either in arbitration or in court) nor does it expressly prohibit either party from recovering fees that might be available on any independent basis. *Id.* In any event, mere failure to provide for recovery of attorneys' fees is not substantively unconscionable. *See Monex Deposit Co. v. Gilliam*, 671 F. Supp. 2d 1137, 1147 (C.D. Cal. 2009) (upholding term barring fee recovery).[2]

Second, the arbitration fees are fair. The agreement expressly states that arbitration fees are limited by the AAA Consumer Rules. TOU § XIV.A.4 ("Your arbitration fees and your share of arbitrator compensation shall be governed by the AAA Rules and, where appropriate, limited by the AAA Consumer Rules."). Although Plaintiff contends that the TOU are unconscionable because they would allegedly require her to pay a $775 filing fee to arbitrate her claims, the actual fees (if any) would be much lower. For consumer claims under $10,000, like the one alleged here, the only fee required from Plaintiff would be $125 (which would be refunded if not used). Request for Judicial Notice Exh. A at 8 (AAA Supplementary Procedures for Consumer-Related Disputes, "Fees and Deposits to be Paid by the Consumer"); *id.* Exh. B at

[2] Plaintiff's argument that the indemnification provision of the TOU (TOU § XII) allows Google to seek indemnification Google's attorneys' fees arising from Plaintiff's own claims against it (Complaint ¶ 75(f)), fails because that is not a reasonable interpretation of the plain terms of that provision. The indemnification provision expressly requires indemnity of "attorneys' fees" for claims made by a "third party"—not claims made by Plaintiff herself. TOU § XII.

2 ("Who pays the arbitration costs?"). The Company would pay a larger initial fee, as well as "all arbitrator compensation deposits" beyond the consumer's allotted fee. *Id.* Exh. A at 8-9 ("Fees and Deposits to be Paid by the Business"). If the arbitrator deemed the $125 fee too expensive, Plaintiff would pay nothing at all: the arbitration clause specifically provides that the "Company will pay all arbitration fees and expenses." TOU XIV.A.4.

Third, the bar on class arbitration is not unconscionable, under the Supreme Court's recent decision in *AT&T Mobility v. Concepcion*. *Concepcion*, 131 S. Ct. at 1746-47. *Concepcion* held that class action arbitration waivers are fully enforceable, and that the FAA's strong federal policy in favor of arbitration preempted a contrary California rule that invalidated almost all consumer class arbitration waivers as unconscionable (the *Discover Bank* rule). *Id.* Accordingly, *Concepcion* enforced a waiver of class arbitration similar to the one at issue here, finding that it could not be set aside as unconscionable even though California courts had previously found waivers of class *litigation* to be unenforceable for certain types of claims. *See id.*; *AOL, Inc. v. Sup. Ct.*, 90 Cal. App. 4th 1, 4-5 (2001) (rejecting waiver of class litigation).

Fourth, Plaintiff's challenges to other provisions, such as the waiver of injunctive relief claims, are irrelevant to the enforcement of the arbitration clause because they apply equally in arbitration or in court. TOU ¶ XIV.A.2. Because they are part of the broader TOU contract—not the arbitration agreement at issue on Defendants' motion to compel arbitration—they are not relevant to determining whether the arbitration agreement is enforceable. *See Buckeye*, 546 U.S. at 449; TOU § XIV.A.6. In other words, whether these provisions are enforceable or not is a contract law question that, like Plaintiff's other claims, is subject to arbitration.

The arbitration clause in the SuperPoke! Pets TOU gives Plaintiff a fair mechanism to resolve her claims in arbitration. It is not substantively unconscionable, and it must be enforced.

2. The arbitration provision is not procedurally unconscionable.

Because the arbitration provision is not substantively unconscionable, it cannot be found unconscionable under California's two-part test (which requires *both* substantive and procedural unconscionability to invalidate a contract). If the Court chooses to consider procedural

unconscionability, the arbitration clause here passes this test as well. California law requires actual oppression or surprise to find a contract procedurally unconscionable; merely labeling a contract an adhesion contract does not make it unconscionable or unenforceable. *Morris*, 128 Cal. App. 4th at 1318; *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 483 (2006). There can be no claim of "oppression" here. Under California law, a contract for a "nonessential recreational activity," like playing an online video game, cannot be procedurally unconscionable because "the consumer always has the option of simply forgoing the activity." *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1245-46 (2007) (refusing to find oppression in contract for cable music service); *see also Pokrass v. The DirecTV Group, Inc.*, No. EDCV 07-423-VAP, 2008 WL 2897084 (C.D. Cal. July 14, 2008) ("[T]here appears to be no disagreement among California courts that contracts for nonessential recreational activities cannot be procedurally unconscionable.").

As in *Belton*, Plaintiff cannot allege that she was under pressure of any kind to play SuperPoke! Pets in her leisure time instead of playing other online games or engaging in other similar recreational activities (or none at all). Unlike a consumer seeking medical care, or an employee compelled to accept arbitration to maintain employment, or even an individual seeking less urgent life essentials, potential users of SuperPoke! Pets were under no external pressure to accept the game's terms, and no "oppression" exists here as a matter of law. *Belton*, 151 Cal. App. 4th at 1245-46. *Cf. Morris*, 128 Cal. App. 4th at 1320-21 (discussing cases finding oppression in medical and employment situations).

Moreover, Plaintiff makes no allegations of "surprise" that would support a finding of procedural unconscionability, nor does the text of the TOU support such a finding. The Complaint admits that a "contract was made" as to the TOU, yet claims that it was "an adhesion contract" because the parties "did not have equal bargaining power at the time," because Plaintiff "had no opportunity to negotiate any specific terms," and because the substantive terms allegedly

"solely favor[] Defendants."[3] Complaint ¶ 63. These allegations conclusively establish the existence of the TOU contract and they are inconsistent with any claim of surprise. *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F. 2d 224, 226 (9th Cir. 1988) (holding factual assertions in pleadings are judicial admissions "conclusively binding on the party who made them"); *Valdiviezo v. Phelps Dodge Hidalgo Smelter, Inc.*, 995 F. Supp. 1060, 1065 (D. Ariz. 1997) (applying *Lacelaw* to enforce arbitration agreement). In addition, as recently as September 15, 2010, Plaintiff affirmatively agreed that her use of all Slide services—including play of Superpoke! Pets—was governed by the Slide TOU. Michalek Decl. ¶ 3; Ex. 2. By doing so, Plaintiff received clear notice that "YOUR USE OF ANY OF THE SERVICES CONSTITUTES YOUR AGREEMENT TO THESE TERMS." *Id.* Exh. 3.[4]

No procedurally unconscionable surprise occurred here, because the arbitration agreement is not unreasonably concealed or disguised within the broader TOU. Rather, it appears within a section of the TOU for "Miscellaneous" items, under the heading (in bold text) **"Governing Law/Resolution of Disputes/Waiver of Injunctive Relief."** TOU § XIV.A. The arbitration provision itself carries the bold heading "**Binding Arbitration**" and includes a capitalized warning as follows: "YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL." TOU § XIV.A.4. The arbitration provision was clearly visible to any user who glanced through even the headings of the document—and the beginning of the TOU cautioned users that the terms would be binding on them if they chose to play the game: "If you do not agree to be bound by these Terms in their entirety, you must cease accessing or otherwise using the Services in any way. YOUR USE OF ANY OF THE SERVICES CONSTITUTES YOUR AGREEMENT TO

[3] A contract of adhesion is nevertheless fully enforceable unless it falls outside of the reasonable expectations of the weaker party or is unduly oppressive or unconscionable; this inquiry is effectively the same as the more modern analysis of substantive and procedural unconscionability. *Morris*, 128 Cal. App. 4th at 1317 (discussing *Graham v. Scissor–Tail, Inc.*, 28 Cal. 3d 807, 820 (1981)).

[4] The TOU in effect as of September 15, 2010 contain the same arbitration clause as the most recent TOU. *Compare* Michalek Decl. Exh. 1 *with* Michalek Decl. Exh. 3.

THESE TERMS." TOU (preamble) (capitalization original). If a user chose to ignore that warning, that does not make the contract procedurally unconscionable or excuse her from its terms.[5] *See Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 964 (9th Cir. 2012) (failure to read a contract does not make arbitration term unenforceable); *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1318-19 (1986) (same).

Because the TOU's arbitration provision is valid and enforceable under California law and the FAA, Plaintiff's claims should be ordered to arbitration.

B. Alternatively, Plaintiff's Complaint Must be Dismissed Because Plaintiff Cannot State Any Valid Claim Against Google or Slide.

Alternatively, Plaintiff's Complaint should be dismissed in its entirety for failure to state a claim, under Federal Rule of Civil Procedure 12(b)(6). A complaint can survive a motion to dismiss under Rule 12(b)(6) only if it asserts a cognizable legal claim and sets forth factual allegations sufficient to make that legal claim a plausible, not merely conceivable, claim for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a plausible claim. *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 555 ("[A] formulaic recitation of the elements of a cause of action will not do."). Although courts generally must accept well-pleaded factual allegations as true, a court need not credit "allegations that contradict matters properly subject to judicial notice or by exhibit," or "unwarranted deductions of fact [and] unreasonable inferences." *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

At its core, Plaintiff complains it is unfair that she could not receive any lasting or tangible benefits by playing a virtual online game, in spite of her alleged "investment" of actual money to enhance her playing experience. *See* Complaint ¶ 2. Whatever the legal theory, this is not a cognizable or a plausible claim. The Complaint and the TOU it relies on make clear that

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[5] Plaintiff should be compelled to arbitrate all of her claims. If any of Plaintiff's claims are not sent to arbitration, however, they should be stayed pending arbitration. 9 U.S.C. § 3.

Plaintiff received exactly what she signed up for and exactly what Google and Slide reasonably agreed to provide. There is nothing unfair or misleading either about that agreement or about Defendants' decision to discontinue the game and the announcements they made about that decision. Plaintiff also does not plausibly allege that she or anyone else has incurred any real harm from the conduct she challenges. She signed up to play an online game under clear terms of use setting the ground rules of that game, chose to spend money to enhance her play, and played the game on those terms beginning in 2009. Then, after Defendants decided to shut down the game, Plaintiff received six more months to play, and two different options for preserving a modified form of her virtual items.[6] She has suffered no cognizable harm.

As discussed below, Plaintiff's claims are legally defective, self-contradictory, and factually implausible, and must be dismissed in their entirety.

1. Plaintiff's First and Second Causes of Action must be dismissed.

a. Plaintiff cannot challenge provisions of the TOU unless she alleges that those particular provisions are being enforced against her and causing her injury, which she has not done.

Plaintiff's First and Second Causes of Action (Complaint ¶ 62-92) fail because she lacks standing to bring them. To have standing, Plaintiff must allege an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

Plaintiff's disjointed allegations seek a declaratory judgment that certain provisions of the TOU are unconscionable, but the provisions that she identifies are irrelevant to her alleged injury. For example, while Plaintiff claims it is unconscionable that certain TOU provisions allowed Defendants to cancel her account and virtual items or currency "without notice" or "for no reason," she does not allege that Defendants did that. *See* Complaint ¶ 67. Also, while she claims that a clause providing for the user to indemnify the Company for acts of third parties is

[6] In context, even six months' notice was substantial: as of the June 2011 announcements, the game had been available for a little more than three years, since April 2008. See Complaint ¶ 9. Plaintiff herself had been playing for only approximately two years, since 2009. Complaint ¶ 49.

unconscionable (Complaint ¶ 69), Plaintiff identifies no request by Defendants for such indemnification. Further, while she challenges provisions limiting the period of damages and selecting a one-year statute of limitations (Complaint ¶¶ 71, 73), she identifies no actionable harm caused by Defendants. In essence, while Plaintiff's First and Second Causes of Action complain that the TOU contain "get out of jail free" clauses (Complaint ¶ 65), she fails to allege any wrongful conduct that would put use of a "get out of jail free" clause at issue. Accordingly, these claims must be dismissed because Plaintiff lacks standing to challenge them. *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA 2011 WL 1362165, *5 (N.D. Cal. April 11, 2011) (refusing to address provision allowing unilateral contract amendment, where no such amendment had been made for plaintiff).

Indeed, the essence of Plaintiff's Complaint is that Slide and Google were somehow obligated to keep Superpoke! Pets operational indefinitely. But Plaintiff does not challenge the provisions of the TOU that expressly permitted Defendants to discontinue the game and that provided that purchases of virtual items are nonrefundable. Nor could she challenge them. It defies common sense to claim that a company must either maintain an online game indefinitely once it is offered, or refund its customers all of their money upon termination if it ever terminates the game. The terms Plaintiff challenges simply are not applicable to her alleged harm.

Because Plaintiff cannot allege any "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," these claims must be dismissed. *Friends of the Earth*, 528 U.S. at 180.

b. The SuperPoke! Pets Terms of Use are not unlawfully "exculpatory," unconscionable or illusory.

Further, the First and Second Causes of Action fail for the additional reason that the TOU are not unlawful, unconscionable or illusory as a matter of law.[7] As explained above, far from

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[7] These claims for declaratory relief invoke California Civil Code § 1670.5 or 1668 (*see* Complaint ¶ 83), and claim that the TOU are "illusory" and "lack mutuality" (*see* Complaint ¶ 87). Civil Code Section 1670.5 codifies the same unconscionability standard previously discussed. Civil Code Section 1668 prohibits contracts that exempt a party "from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law."

condoning fraud or other misbehavior, the TOU set clear ground rules for the game and cautioned users that given the nature of the game, users have no property rights in the game at all. TOU § IV.B.[8] Another section of the TOU clarified that the game "include[s] a component of fictional currency" known as Gold ("Virtual Currency"), but that "[r]egardless of terminology used, Virtual Currency represents a limited license right governed solely under these Terms, and is not redeemable for any sum of money or monetary value from the Company at any time, unless these Terms are amended to so provide." TOU § VI.A. Yet another section—titled "Virtual Currency/Virtual Goods Have No Cash Value"—required users to "acknowledge and agree that Virtual Currency and Virtual Goods have no cash value and that neither the Company nor any other person has any obligation to exchange your Virtual Currency/Virtual Goods for anything of value." TOU § VI.D.

Nor can Plaintiff succeed in challenging provisions of the TOU that allow Defendants to terminate individual players' accounts and the virtual items associated with them (Complaint ¶ 66-68), and limit remedies in related disputes. Those provisions are reasonable and fair in the context established by the rest of the TOU and the circumstances of the game. It does not "shock the conscience," which is required to show substantive unconscionability, as discussed above, for the provider of an internet game involving fictional virtual pets and their accessories (including such items as virtual "hot dogs" and "stuffed animals") to reserve the right to stop offering the game and the fictional items in it, or to limit the remedies that players can recover in the event of disputes over fictional items included as part of the game. *Morris*, 128 Cal. App. 4th at 1322; *Belton*, 151 Cal. App. 4th at 1245-46. None of the challenged provisions is unconscionable.

For example, reasonable parties could agree (as they did here in the TOU) that after more than 90 days had passed, a player of SuperPoke! Pets would have enjoyed all the benefits of a particular virtual purchase and should not be allowed to recover any related damages beyond that

[8] In fact, California law holds that a contract for a "nonessential recreational activity" like SuperPoke! Pets *cannot* be oppressive and procedurally unconscionable because (as previously discussed in Section III.A) "the consumer always has the option of simply forgoing the activity." *Belton*, 151 Cal. App. 4th at 1245-46 (considering contract for cable music service).

period. *See West v. Henderson*, 227 Cal. App. 3d 1578, 1588 (1991) (upholding six-month limitations period that applied only to tenant). Also, contrary to Plaintiff's allegations, the 30-day informal dispute resolution requirement (TOU § XIV.A.3) does not reduce the 90-day damages limit as Plaintiff claims (Complaint ¶ 74(d)): the 90-day limit specifically includes the 90 days "immediately preceding the date on which [a user] first assert[s] [a] claim," including in informal negotiations, not the date on which a claim is formally filed. TOU § XI.C.

Similarly, the same parties could also reasonably agree for players to waive injunctive relief, recognizing that the nonessential nature of the game and the limits of the parties' substantive rights meant a player would in any event be unable to demonstrate "irreparable injury" or "inadequacy of legal remedies"—both of which are essential to any right to injunctive relief. *See Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982) ("[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies."). At the same time, Defendants as the providers of the game could reasonably retain greater rights to seek damages and injunctive relief—as necessary to protect the game and the game's other users, as well as the company's business interests, from abuse by players. The TOU expressly required Plaintiff to "acknowledge that the rights granted and obligations made hereunder to [Defendants] are of a unique and irreplaceable nature, the loss of which shall irreparably harm the company and which cannot be replaced by monetary damages alone." TOU § XIV.A.2. As an example, Defendants might need injunctive relief to enforce the TOU's prohibitions against reverse engineering the software, "disseminat[ing] or transmit[ting] viruses," sending spam, or tricking users into revealing sensitive information. *See* TOU § VIII.C.

And while Plaintiff challenges the one-year limitations period in the TOU (TOU § XIV.D), parties to a contract can modify the limitations period that would otherwise apply to an action "so long as the time allowed is reasonable." *Soltani v. W.&S. Life Ins. Co.*, 258 F.3d 1038, 1043 (9th Cir. 2001) (quoting *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir. 1995)). This rule is well settled in California law. *See Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 38 Cal. App. 4th 1532, 1548 (1995). A one-year limitations period is ample,

especially in this context. Courts regularly uphold even shorter contractual limitations periods under California law. *Soltani*, 258 F.3d at 1043-44 (upholding six-month limitations period in employment contract; discussing cases enforcing even shorter periods).[9]

None of the challenged TOU provisions is unconscionable or exculpatory, and Plaintiff's First and Second Causes of Action must be dismissed.

2. Plaintiff's Third Cause of Action fails to state a cognizable legal claim.

In addition to all of the substantive reasons that Plaintiff is not entitled to relief of any kind, discussed herein, Plaintiff's Third Cause of Action for "Injunctive Relief" (Complaint ¶ 93-97) must be dismissed: "[I]njunctive relief 'is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted.'" *Vissuet v. Indymac Mortgage Services*, No. 09-CV-2321, 2010 WL 1031013, *7 (S.D. Cal. March 19, 2010) (quoting *Shell Oil Co. v. Richter*, 52 Cal.App.2d 164, 168 (1942) (citation omitted)). Moreover, because each of Plaintiff's claims fails for separate reasons, "injunctive relief" is not available even as a remedy.

3. Plaintiffs' Fourth Cause of Action for violation of the Consumer Legal Remedies Act (CLRA) must be dismissed with prejudice because Plaintiff has not alleged any unlawful conduct and Plaintiff failed to provide mandatory statutory notice of her claims.

Plaintiff's CLRA claim is fatally flawed. First, Plaintiff fails to allege deceptive or fraudulent conduct. Second, Plaintiff failed to notify Defendants of her specific CLRA claim before seeking damages in court, as the CLRA strictly requires to protect business owners and promote prompt resolution of legitimate claims.

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[9] Even if the Court were to find any specific provision of the TOU unenforceable, which it should not on these facts, the rest of the TOU should still be enforced. Under California law, unconscionable provisions should be severed unless an agreement is "permeated by unconscionability." *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1477-78 (2009). Moreover, the TOU includes a severance provision, which is fair and enforceable in this context, providing that all terms "shall continue to be in full force and effect" except to the extent that they are found to be unenforceable. TOU § XIV.B.2.

a. Plaintiff has not alleged any cognizable CLRA claim.

Plaintiff's CLRA claim fails because the TOU and other documents Plaintiff relies on contradict and fatally undermine Plaintiff's conclusory allegations that Defendants' conduct was deceptive or unconscionable, and Plaintiff's claim does not involve goods or services covered by the CLRA, among other defects. To state a CLRA claim, Plaintiff must allege that Defendants engaged in a particular "method, act, or practice declared to be unlawful by [Civil Code] Section 1770," that the plaintiff has "suffer[ed] . . . damage," and a causal link between the two such that the damage occurred as "a result of" the unlawful practice. *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2009); Cal. Civ. Code § 1780. Under Section 1770, the unlawful practice must occur in a transaction intended to result or resulting in the sale of goods or services to a consumer. Cal. Civ. Code § 1770(a).

None of Plaintiff's allegations meet this standard. Plaintiff claims that Defendants violated the CLRA by: (1) "[i]n violation of [Cal. Civ. Code] § 1770(5), representing that goods or services have characteristics, uses, or benefits which they do not have," (2) "[i]n violation of § 1770(9), advertising goods and services with intent not to sell them as advertised," (3) "[i]n violation of § 1770(1)[10], representing that a transaction confers or involves rights, remedies, or obligations which it does not involve," and (4) "[i]n violation of § 1770(19), inserting an unconscionable provision in a contract." Complaint ¶ 106.

First, these conclusory statements, which simply parrot the language of the cited statutes (almost verbatim) without offering any supporting facts, are not plausible factual allegations that can sustain Plaintiff's claim. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 555 ("[A] formulaic recitation of the elements of a cause of action will not do.").

Second, Plaintiff's assertion that she obtained "goods" or "services" protected under the CLRA as a result of her SuperPoke! Pets play fails as a matter of law. The CLRA expressly

[10] This language actually corresponds to Civil Code Section 1770(14), not the section cited here.

defines goods as "*tangible* chattels," which could not include intangible elements of an online game like the virtual items at issue here. *See* Complaint ¶ 103; Cal. Civ. Code § 1761(a) (defining "goods" under the CLRA). Likewise, by granting her a limited license to use the SuperPoke! Pets software (not any tangible goods), Defendants did not provide Plaintiff with "services" as the CLRA defines that term. Providing access to an intangible good like software is not a protected "service" under the CLRA because it "is not work or labor, nor is it related to the sale or repair of any tangible chattel." *See Fairbanks v. Sup. Ct.*, 46 Cal. 4th 56, 61 (2009) (holding life insurance is not a service); Cal. Civ. Code § 1761(b) (defining "services"). Thus, "the CLRA does not cover transactions relating to the sale or lease of software," because software is neither a tangible good nor a service as defined in the CLRA. *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2010 WL 3910169, *14 (N.D. Cal. Oct. 5, 2010).

Third, to the extent that Plaintiff's nebulous CLRA claim targets: (1) Defendants' announcements of changes to the game in June 2011; (2) Defendants' decision to terminate the game; and (3) Defendants' decision not to give refunds to players who had purchased "gold" within the game or signed up for VIP status, it fails because none of these assertions allege unlawful or deceptive conduct. As explained above, these allegations are contradicted by the TOU, which (1) made clear that users received only a limited license to use the game (TOU § IV.B); (2) affirmatively cautioned players that the company could discontinue or alter the game at any time (TOU § II.B); and (3) made clear that SuperPoke Pets!'s "virtual currency" created no property rights and that all sales were final (TOU § VI.A and TOU § VI.F).

Fourth, the TOU and the actual text of the June 2011 announcements about SuperPoke! Pets contradict Plaintiff's claims that Defendants acted deceptively or misrepresented the limited nature of players' rights and expectations related to the game. Michalek Decl. Exhs. 4 & 5. No reasonable user could have expected lifetime or guaranteed enjoyment of any virtual items purchased in the game, based on the nature of the game and Defendants' statements that the game would remain available for the "foreseeable future." *Id.* Any claim that Defendants' conduct was deceptive is not plausible, because the TOU under which users played the game

made clear that virtual items had no monetary or enduring value and were nonrefundable, and that the game could be shut down at any time.[11]

Finally, Plaintiff's CLRA claim also fails because Plaintiff does not allege any injury, and relief is available under the CLRA only to a "consumer who suffers any damage as a result" of unlawful conduct. Cal. Civ. Code § 1780(a). Because Plaintiff agreed in the TOU that virtual items and currency had *no* cash value and conveyed no ownership rights (see above), Plaintiff cannot claim injury from "diminution in value of th[ose] virtual items" or plausibly characterize her in-game payments as "investments." *See* Complaint ¶ 109, 47. Moreover, since Plaintiff alleges that the ability to purchase "Gold" items was eliminated in July 2011, Plaintiff had eight months to enjoy any items she "purchased" in the game allegedly as a result of the announcements Defendants made about the game. Plaintiff also alleges that Defendants gave SPP users a full six months' warning that they intended to shut down the game in March 2012, and that Defendants gave users two options for keeping a memento of their fictional pets once the game was shut down. Complaint ¶ 44, 46. Thus, Plaintiff suffered no damages, her alleged injury that Defendants have "entirely strip[ped] the value" from her purchases is not plausible on its face, and her CLRA claim must be dismissed. Complaint ¶ 47.

b. Plaintiff failed to comply with statutory prerequisites to filing damage claims under the CLRA.

Plaintiff's CLRA claim also fails procedurally. The CLRA requires a plaintiff seeking damages under that statute to give defendants specific notice of the "particular alleged violations of Section 1770" at least 30 days prior to filing a claim seeking damages under the CLRA, to allow defendants a reasonable opportunity to correct any actual statutory violations. Cal. Civ. Code § 1782(a). Specifically, at least 30 days before filing a damages suit, a consumer must "[n]otify the person alleged to have employed or committed methods, acts, or practices declared

[11] Moreover, to the extent that Plaintiff's CLRA claim alleges fraudulent conduct, it also must be dismissed for failure to comply with the Fed. R. Civ. P. 9(b) requirement that claims of fraud must be pled with particularity, because Plaintiff fails to allege any specific fraudulent statements, or how, when, and by whom they were made.

unlawful by Section 1770 of the particular alleged violations of Section 1770" and "[d]emand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation." *Id.* Plaintiff's Complaint "seeks injunctive relief and monetary damages under the CLRA."[12] Complaint ¶ 109. Plaintiff did not provide notice complying with Section 1782(a) before filing this action, however, nor has she alleged that she gave the required notice. Federal courts have required "[s]trict adherence to the statute's notice provision . . . to accomplish the [CLRA's] goals of expeditious remediation before litigation." *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1195-96 (S.D. Cal. 2005). Plaintiff's claim for damages should therefore be dismissed with prejudice.[13] *Id.*; *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1077 (N.D. Cal. 2011) (dismissing without prejudice).

Plaintiff's CLRA claim should also be dismissed because Plaintiff did not comply with the CLRA's requirement that "[i]n any action [under the CLRA], concurrently with the filing of the complaint, the plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county described in this section as a proper place for the trial of the action." Cal. Civ.Code § 1780(d). If "a plaintiff fails to file the affidavit required by this section, the court shall, upon its own motion or upon motion of any party, dismiss the action without prejudice." *Id.*; *see In re Sony Grand Wega KDF–E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F.Supp.2d 1077, 1093–94 (S.D. Cal. 2010) (dismissing CLRA claim because plaintiffs failed to provide the required affidavit); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, 802 F.

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[12] Immediately following this statement, Plaintiff also states that "[f]or the sake of clarity, Plaintiff specifically disclaims any right to recover damages under the CLRA at this time." Complaint ¶ 109. The intended import of this statement is unclear.

[13] Defendants do not intend to suggest that Plaintiff gave no notice whatsoever of an impending dispute related to SuperPoke! Pets. Plaintiff's counsel sent Defendants a two-paragraph letter on September 9, 2011, asserting that "the Terms of Use that purportedly govern the use of the SPP application, which contain numerous ambiguous, illusory, and consumer unfriendly terms, is invalid and unenforceable with respect to Ms. Abreu's claims," and purporting to give notice of Plaintiff's claims "pursuant to Section XIV(A)(3) of the . . . Terms of Use." This letter did not identify the claims at issue or the nature of the alleged wrongful conduct by Defendants, however, as required to comply with the CLRA notice provision.

Supp. 2d at 1077. Plaintiff filed no such affidavit.

4. Plaintiff's Fifth Cause of Action for violation of California's Unfair Competition Law must be dismissed.

Plaintiff's Section 17200 claim is similarly flawed. Plaintiff's claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, seeks relief under each of the three prongs of the UCL—claiming "unlawful," "unfair", and "fraudulent" conduct by Defendants—but fails for the same fundamental reasons as her other claims. Plaintiff knowingly paid real money to play a virtual game, under terms of use that made clear she was getting nothing more than a temporary right to play the game, and she has had ample time to play the game and enjoy the benefits of her purchases. As alleged, there is nothing unlawful, unfair or fraudulent about Defendants' conduct, and this claim must be dismissed.

a. Defendants' alleged conduct was not unlawful.

Plaintiff's UCL claim for "unlawful" conduct must be dismissed because it depends on Plaintiff's defective CLRA claim, and fails along with that claim for of all the reasons previously discussed. *See Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001) (holding conduct that did not violate borrowed statute was not "unlawful" under Section 17200).

b. Defendants' alleged conduct was not unfair.

Second, Plaintiff's UCL claim for "unfair" conduct must also be dismissed. Plaintiff has not plausibly alleged the three elements that are required to show "unfairness" under the UCL: "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1403 (2006); *see Kilgore v. Keybank, Nat'l Ass'n*, 712 F. Supp. 2d 939, 951-52 (N.D. Cal. 2010) (applying *Camacho*), vacated on other grounds, 673 F.3d 947 (9th Cir. 2012).

Here, there is nothing unfair about the actual TOU or Defendants' alleged conduct, and Defendants caused no injury to Plaintiff or anyone else. Plaintiffs' UCL claim thus fails because she cannot satisfy the statutory requirement that a plaintiff must have "suffered injury in fact and

[have] lost money or property as a result of the [alleged] unfair competition." Cal. Bus. & Prof. Code § 17204. Also, Defendants' reservation of rights to its software (including the right to stop offering it) logically benefited consumers by allowing Defendants to offer the game for users' enjoyment for the three years of its existence. As a matter of common sense, no rational business owner would offer the game at all if doing so required the owner to maintain it in perpetuity. Since Plaintiff alleges no plausible injury as a result of Defendants' conduct, the benefits of Defendants' actions outweigh that non-existent injury. *See* Complaint ¶ 114.

c. Defendants' alleged conduct was not fraudulent.

Plaintiff's UCL claims based on "fraudulent" conduct (including the remainder of her "unfair" conduct claim discussed above, which also depends on deceptive or fraudulent conduct) must also be dismissed. These claims depend on the same facially contradictory and implausible allegations discussed above, Plaintiff alleges no real injury, and Plaintiff fails to plead the alleged fraudulent conduct with particularity under Rule 9(b). To the extent that Plaintiff might appear to state any superficially cognizable claim here, her claim must be rejected under *Twombly* and *Iqbal* because it simply recites conclusory statutory elements in the guise of facts. *See* Complaint ¶ 116. Plaintiff's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a plausible claim. *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 555.

5. Plaintiff's Sixth Cause of Action for "Fraud in the Inducement" must be dismissed.

Plaintiff states no plausible claim of fraud of any kind, for all the reasons described above. Plaintiff was told that Defendants could terminate the game at any time and that her fictional purchases of fictional currency or items did not create any actual property rights, and as explained above, her Complaint and the documents referenced therein indicate that the only specific factual allegations she claims were fraudulent were in fact true or were never made.

Plaintiff's fraud claim, like her UCL claims of "fraudulent" conduct, is also inadequate under Rule 9(b) and *Twombly/Iqbal* pleading requirements. Plaintiff makes no plausible specific

factual allegations of false statements by defendants or actual reliance on those statements by Plaintiff, and thus fails to plead the alleged fraud with particularity as required under Rule 9(b). Plaintiff's allegations are deficient, implausible, and contrary to the actual written record, to the extent they relate to Defendants' termination of the game and related announcements, and the Court is not required to credit them. *See* Complaint ¶ 120, 121; *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049 at 1055. Plaintiff also makes no specific factual allegations at all to support her claim that Defendants engaged in fraudulent conduct related to the alleged "limited quantity" of certain items in the game available for purchase with virtual "Gold." *See* Complaint ¶ 122.

6. Plaintiffs' Seventh Cause of Action for "Unjust Enrichment" must be dismissed because no such cause of action exists in California.

Finally, Plaintiff's Seventh Cause of Action, for "Unjust Enrichment," is fatally defective because no such independent cause of action exists in California. As a court in this district recently explained, "courts have repeatedly held that 'there is no cause of action in California for unjust enrichment.'" *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d at 1077 (citation omitted). This cause of action also must be rejected. Plaintiff's defective claims also offer no basis for any remedy premised on unjust enrichment.

IV. CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court compel Plaintiff to arbitrate the claims asserted in this action, as required under the SuperPoke! Pets TOU on which Plaintiff's claims rely. In the alternative, Defendants request that the Complaint be dismissed in its entirety for failure to state any claim on which relief can be granted.

Respectfully submitted,

Dated: April 24, 2012

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